SUPREME COUR...

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 197.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Petitioner,

v.

HALCYON LINES AND VINKE AND COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

This case comes before the Court on writ of certiorari issued to review final judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania, filed April 3, 1950, appears on R. 175 to 179, inclusive, and R. 221 to 226, inclusive, of the record and is reported in 89 F. Supp. 765. The opinion of Circuit Judge Kalodner of the United States Court of Appeals for the Third Circuit, filed February 21, 1951, appears on R. 229 to 235, inclusive, of the record and is reported in 187 F. 2d 403.

JURISDICTION.

The jurisdiction of this Court to review the final judgment of the United States Court of Appeals for the Third Circuit is provided in Section 1254(1) of Title 28, United States Code.

COUNTER STATEMENT OF THE CASE.

In the factual history of the case as stated by the petitioner (p. 3, Pet. Brief) there are lacking certain facts necessary to a complete understanding of the circumstances of the case. We do not here restate all of the facts, but rather supplement those stated by the petitioner.

The grain fittings and the grain feeder are temporary wooden structures built into the hatches and holds of the ship *solely* to enable it to carry a cargo of bulk grain, and if other cargo is to be carried, they are taken out, leaving the vessel structurally the same as before they were built. They would interfere with carrying any other kind of cargo (R. 49, 58, 78).

The two stage planks in the grain feeder in question were pieces of lumber, each about 8 feet long, 3 inches thick and 10 inches wide, running fore and aft near the bottom of the feeder. The ends of these timbers generally rested upon "cleats" which were pieces of wood 15 to 18 inches long, 2 inches thick and 6 inches wide, nailed to the forward and after walls of the feeder (R. 113, 114, 115). These are installed by the workmen who built the feeder and who *themselves* would use them as staging or scaffold on which to stand while lining the inside walls of the feeder with burlap to make it grain tight (R. 115). When these timbers have served the purpose of enabling the workmen to line it, they are sometimes left in place if they are timbers belonging to the vessel, but also sometimes removed if they are lumber belonging to the grain fitters (R. 116).

These two timbers are installed only for the convenience of the workmen building the feeder and are not a necessary part of its construction and have no relation to its function as a grain feeder (R. 49, 78, 79).

It is pointedly urged by the petitioner that there were six feeders in the vessel, but the evidence relates only to the presence of a feeder each in No. 2 and No. 4 holds (R. 80, 83, 84, 85, 92, 123). There is no evidence that there

were feeders in any other holds or that there were stage planks in any other feeders. The significance of the suggested fact of there being six feeders is not clear, except possibly as the basis for an argument that the feeders and stage planks in them are "appliances" of the ship rather than temporary structures.

The petitioner specializes in the business of shoring all kinds of cargo and fitting out grain ships (R. 64, 65). The method of doing the work was determined by the petitioner's employes in the light of long experience without any assistance or advice from the officers or crew of the vessel (R. 68, 69, 81).

The petitioner brought aboard its own gear and equipment necessary to do the work, such as ladders, chains, pennants, blocks, hooks and ropes (R. 69, 70, 81, 82).

The evidence does not support the statement that the lowering of a ladder into the feeder and resting it on the so-called stage planks was in accordance with a long-standing custom. We find no evidence in the record that there was any custom or customary way of workmen entering a feeder further than the testimony of Baccile to the effect that every ship on which he ever worked had stage plankings in them. His foreman who was working with him at the time did not testify as to the existence of any custom of the method of entering a grain feeder. He had worked only for the petitioner (R. 95).

The record does not support petitioner's statement that "it is necessary to know that it is the practice that grain feeders similar to the one here in question are *always* fitted with stage planks at the bottom and that workmen coming aboard to make alterations or minor repairs to the feeders *always* utilize these planks as the only available practical platform from which their work can be done (R. 129)" (p. 7, Pet. Brief). The testimony referred to as supporting the statement just quoted is that of Baccile, the injured man, and is limited to his personal experience. There is no other testimony to support the alleged practice.

Before Baccile descended the ladder, no inspection was made to see whether the timber on which the end of the ladder was to be rested was secure. The foreman, before lowering the ladder onto the plank with the assistance of the injured man, used the ladder to tap the plank at the end where it was to be rested and in the middle in an attempt to ascertain whether the plank was sound, but no other inspection of the plank or its fastening was made (R. 87). He did not tap the end of the plank which gave way (R. 98). He did not testify that this was a customary test. He said: "I testified that it is not a test, it is merely a habit" (R. 97). Neither Baccile nor his foreman, from where they stood on deck, could see the ends of the plank or the condition of the cleats under them, as the burlap had fallen and obscured them (R. 88, 129). The foreman in charge of all work on this ship made no inspection of No. 2 hold before starting work therein as he did not have time so to do (R. 825).

The ladder, after being placed upon the plank, was not secured either at top or bottom by a rope or other means (R. 90, 130). The inside of the feeder could have been entered for the purpose of inspecting the plank by a rope ladder, but none was furnished by the petitioner (R. 50, 132, 133).

Running parallel and slightly lower than the planks were two steel beams which were part of the ship's permanent equipment (R. 89, 127). It was demonstrated at the trial by the use of a scale model of the hold of the vessel that a platform made of hatch covers or other boards could have been laid down on these beams and lashed to them and thus provide a safe working place (R. 50, 51, 52, 55, 131, 132).

Argument.

I. THE CHARGE OF THE TRIAL COURT WAS CORRECT AND THE EVIDENCE SUPPORTS THE SPECIAL FINDINGS OF THE JURY.

(A) The Charge and Special Findings of the Jury.

The trial judge properly charged the jury that the petitioner would be negligent if it failed (1) to make proper inspection, (2) to furnish competent foremen and supervisors and (3) to perform its work in a careful and proper manner (R. 160).

There was sufficient evidence from which the jury could have found against the petitioner on all of these issues.

The petitioner's contention that there were alternate theories of recovery is without merit. The respondents claim contribution from the petitioner on the ground that it was *negligent* and jointly liable for any recovery which the plaintiff might make against the respondents. The basis for claiming contribution was *negligence*, and some of the specifications of negligence were that the petitioner neglected to make adequate inspection of the staging, failed to provide a safe working place for the plaintiff and neglected to provide necessary safeguards to prevent the injury and provide for the plaintiff's safety, and in other respects to be shown at the trial (R. 14, 15).

The proof of any *one* of these specifications was sufficient to sustain the charge of negligence which is the basis of the respondents' cause of action. The respondents did not claim that there was any other basis upon which the petitioner could be liable to contribute to them.

The petitioner contends that there was error *only* in instructing the jury that there was a duty on the petitioner to inspect.

There is no merit to the contention that the verdict is a general one which might have been founded solely on the failure of respondents to inspect.

There was no general verdict in this case. It is clear from the record that the trial judge did not direct the jury to render a general verdict, but submitted specific questions to them and required definite answers. The questions submitted were, as follows:

> "'Were the employees of Haenn Ship Ceiling and Refitting Corporation negligent so that they caused or substantially contributed to the injuries sustained by the Plaintiff Baccile?'
>
> "You will answer that 'yes' or 'no'.
>
> "If your answer to that is 'yes', then state the percentages by which the original defendant Halcyon and the third party defendant Haenn were negligent so as to contribute to the injuries sustained by the plaintiff.
>
> "Then we have a little line, 'Haenn Ship Ceiling and Refitting Corporation,' and the percentage.
>
> "'Those in charge of the S. S. "Stad Vlaardingen" and the little line for the percentage.'" (R. 214)

The jury's answer to the first question was "Yes". In answer to the second Interrogatory, the percentage of negligence was found as to the petitioner to be 75% and as to the respondents 25% (R. 218, 219).

Notwithstanding these special findings by the jury, the petitioner erroneously takes the position that from these findings it could be maintained that the jury might have found that the petitioner was negligent only in respect to a failure to inspect the planks. The record does not justify such a conclusion but, on the contrary, indicates that the jury found the petitioner negligent not only in having failed to inspect the planks, but also in having failed to perform its work properly. The only negligence which could be attributable to the respondents as shipowners was their fail-

ure to inspect the planks and to warn of the existence of known dangers (R. 161). If the only negligence of the petitioner was that of likewise having failed to inspect the planks, the jury would have found them equally negligent. Such was not the case, as the jury specifically found that the negligence of the petitioner amounted to 75%.

The district court, in reviewing the case on the Motion for Judgment N. O. V. recognized that the negligence of the petitioner, as found by the jury in its special findings, was based not only upon a failure to inspect, but upon other negligent acts relating to the manner and way in which it proceeded with its work (R. 223, 224), and mentioned other evidence from which the jury might properly have found that the petitioner did not perform the work in a reasonably safe manner (R. 224).

The petitioner makes the unwarranted assumption that "it is obvious that the Court of Appeals in no manner examined or disposed of Haenn's contentions" (p. 11, Pet. Brief). It is further stated: "The failure of the Court of Appeals to examine Haenn's contentions goes to the very heart of this case" (p. 14, Pet. Brief).

There is nothing to indicate that the Court of Appeals did not fully examine all of the evidence and consider the proper inferences deducible therefrom. That Court said:

> "On a review of the record, we conclude that there was sufficient evidence upon which the jury could reasonably find Haenn *negligent*, not merely in failing to inspect, but as well in failing to go about its work properly." (R. 231) (Italics ours)

(B) The Evidence Shows That a Proper Inspection Would Have Disclosed the Plank to Be Unsafe.

The petitioner does not take the position that there was no duty to inspect but contends that there is no causal connection between the failure to inspect and the accident as the evidence does not show that any inspection, super-

ficial or thorough, would have revealed that the plank was insecure (p. 14, Pet. Brief).

The petitioner flatly says that there is no evidence in the record that an inspection would have revealed any defect, but refrains from discussing any of the testimony pertaining to the *lack* of inspection.

Whether an inspection would have disclosed an unsafe condition was one of the issues of fact properly before the jury, and there was ample evidence from which the jury could infer that an inspection would have disclosed that the end of the plank which gave way was not securely fastened. The facts which the jury had as a basis for its finding were in brief, as follows: The plank was at most 10 inches wide. The end rested upon a cleat or piece of wood which was 15 to 18 inches long, and therefore extended beyond the sides of the plank (R. 113, 114). Had the burlap which was draped over the ends of the plank been raised, which was not done (R. 88, 129), it could have been seen whether the cleat was tightly nailed to the wall of the feeder or whether it was loose or entirely missing (R. 133). If there had been any doubt as to the stability of the cleat, additional nails could have been put in it. This inspection could have been made by means of a rope ladder lowered into the feeder, but no such ladder was brought on board by the petitioner (R. 132, 133).

The perfunctory tapping of the plank in question in the center and at the forward end, as stated by the man who did it, was not intended as an inspection or test (R. 87, 98). He was rather looking for a cracked plank which might have been indicated by the sound of the tapping, but he did not tap the end of the plank which gave way (R. 87, 98). In view of the fact that plank was at a great distance, above the bottom of the ship, a high degree of care was required before sending a man on it to work.

In the face of these undisputed facts it is idle to say that a proper inspection would have disclosed nothing. It was for the jury to decide upon all of the evidence

whether an inspection, if made, would have disclosed that the plank was insecure, and this they could do by inference from the facts adduced. By their special findings the jury have determined this question, and, it is no longer subject to attack in this appellate proceeding.

In *Lavender v. Kurn*, 327 U. S. 645, 653 (1946) this Court said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

There was no error in the charge of the trial judge that there was a duty to inspect since the evidence justified the jury in inferring and finding that a proper inspection would have disclosed the dangerous condition of the plank.

II. THE PETITIONER AND THE RESPONDENTS ARE JOINT TORT FEASORS AND ARE OBLIGATED TO SHARE THE DAMAGES CAUSED BY THEIR CONCURRENT NEGLIGENCE.

We do not here discuss the proportion of the damages which must be borne by the respective parties, as that question is treated in our brief as petitioners in No. 62, October Term, 1951.

The negligence of the petitioner herein consisted of failure (1) to make proper inspection, (2) to furnish competent foremen and supervisors and (3) to perform its work in a careful and proper manner.

The negligence of the respondents was the failure (1) to make proper inspection and (2) to warn petitioner of any known dangerous conditions on the vessel.

As heretofore demonstrated, these issues were fully and properly submitted to the jury (R. 160, 161, 162) which, by its special findings, has determined that both the petitioner and respondents were negligent to the extent that they caused or substantially contributed to the injuries of the plaintiff (R. 173).

Although the acts of the respective parties which constituted negligence were not identical in quality or were done at the same time, together they caused or contributed to the injury.

Negligent acts of two parties done at different times and not of the same character may be considered as the proximate cause of an accident when they contribute to it. In *Porello v. United States*, 153 F. 2d 605, 607 (C. A. 2, 1946),—reversed on other grounds—the court said:

> "The unsound notion that there can be but one 'proximate cause' of an accidental injury has caused some confusion in the cases. None of the authorities cited is applicable to the facts at bar. In our opinion the absence of the lock and Di Mare's negligent order operated concurrently in producing the result."

See *Landgraf v. United States*, 75 F. Supp. 58 (D. C. E. D. Pa. 1947), affirmed in 174 F. 2d 1022 (C. A. 3, 1949) per curiam on the opinion of the court below.

In *The Tampico*, 45 F. Supp. 174 (D. C. W. D. N. Y. 1942), a stevedore engaged in discharging cargo from a barge was injured. The evidence established that his injuries were caused by a defective condition of one of the A-frames of the barge and the concurring negligence of the signal man, the foreman and the crane operator, all of whom were fellow employees of the libellant. The libellant was awarded damages which were divided between his employer, the stevedore, and the owner of the defective barge. In that case the negligence of the barge owner consisted of maintaining a defective barge, whereas the negligence of the libellant's employer were acts of omission or commission committed by other employees of the stevedore in the course of performing the work. Thus the negligence of one of the two joint tort feasors in that case was passive and the other active, which was held to be a basis for contribution. In that case the court said (p. 175):

> "Nicholson's liability to Hedger must be decided in accordance with the admiralty principle of the right to contribution between wrongdoers. Analogies attempted to be drawn from other sources are without persuasive force. 'The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception. [citation] Whatever its origin, the admiralty rule in this country is well known to be the other way. [citations] . . .'. *Erie R. R. Co. v. Erie Transportation Co.*, 204 U. S. 220, 225, 27 S. Ct. 246, 247, 51 L. Ed. 450. Nicholson having secured the payment to its employees of compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., § 901, et seq., is immune from suits for damages resulting from libellant's injuries brought by the libellant or anyone in his right, according to

the provision of Section 905 of the Act. But the right in admiralty to contribution between wrongdoers does not stand on subrogation but arises directly from the tort. *Erie R. R. Co. v. Erie Transportation Co., supra,* 204 U. S. page 226, 27 S. Ct. 246, 51 L. Ed. 450."

In *The S. S. Samovar,* 72 F. Supp. 574 (D. C. N. D. Cal. 1947), injury to a stevedore was caused by a defective pad-eye (p. 581), a part of the ship's appurtenances, and the concurring negligence of the stevedore foreman in charge of the work (p. 590). In that case it was held that, although the negligence of the respective parties was different in character, there was contribution between the joint tort feasors. The court said (p. 589):

"If, by reason of limitation of liability or other statutory immunity, a libelant cannot recover directly from one of two joint tort-feasors, he may proceed against one for the full amount of his damages, and the latter would have a right of contribution for one-half from the other tort-feasor. Aktieselskabet Cuzco vs. The Sucarseco, supra, 294 U. S. at pages 400, 401, 55 S. Ct. 467, 79 L. Ed. 942; The Chattahooche supra, 173 U. S. at page 540, 19 S. Ct. 491, 43 L. Ed. 801. This right of contribution may even be enforced by a separate libel in admiralty after a decree in the original action. Erie R. R. Co. v. Erie & Western Transp. Co., supra, 204 U. S. at page 225, 27 S. Ct. 246, 51 L. Ed. 450."

In *Barbarino v. Stanhope S. S. Co.,* 151 F. 2d 553, (C. A. 2, 1945) the district court dismissed a shipowner's petition to implead libellant's employer. The Court of Appeals reversed, saying, in part (p. 555):

"It would be somewhat difficult to find that the shipowner had any interest to reverse the decree dismissing its petition to implead the stevedore, if the action had been at law in a jurisdiction where there

was no contribution between joint tortfeasors. . . . Whether that would be enough interest to support an appeal we need not decide, because the suit is in the admiralty where contribution between joint tortfeasors has existed since 1875. The Alabama, 92 U. S. 695, 23 L. Ed. 763. The consequence of that right is that the shipowner has a very real interest in holding the stevedore liable."

Petitioner argues that instead of being a joint tort feasor liable for contribution, it is only secondarily liable for Baccile's damages and that the respondents are primarily liable. An analysis of this contention shows that it is based on an erroneous interpretation of the decision of this Court in the case of *Seas Shipping Co., Inc. v. Sieracki*, 338 U. S. 85 (1946), which held that there was a warranty of seaworthiness by the ship in favor of a *stevedore.*

(A) There Is No Warranty of Seaworthiness.

The petitioner is not a stevedore.

Even though Baccile had the benefit of a warranty of seaworthiness—which is not conceded—the petitioner by reason of being his employer does not acquire the same right.

It has not been determined whether the injuries sustained by Baccile were caused by the unseaworthiness of the vessel or by its negligence, as his claim was not litigated.

The rule in *Seas Shipping Co., Inc. v. Sieracki, supra,* which extends to *stevedores* a shipowner's obligation of seaworthiness traditionally owed to seamen was based upon the fact that individual stevedores were performing maritime duties which historically had been performed by seamen. Seamen were entitled to the protection of this warranty because they were bound at sea and in port to carry out the orders of their superior officers and had to work with such tools, and appurtenances as the shipowner furnished to them, and were obliged to work under conditions